

AMENDED IN ASSEMBLY AUGUST 7, 2006

AMENDED IN ASSEMBLY JUNE 21, 2006

AMENDED IN SENATE MAY 26, 2005

AMENDED IN SENATE MAY 4, 2005

SENATE BILL

No. 989

Introduced by Committee on Environmental Quality (Senators Lowenthal (Chair), Campbell, Chesbro, Cox, Escutia, Figueroa, Kuehl, Runner, and Simitian)

February 22, 2005

An act to amend Sections 25395.84 and 25395.85 of, to add Article 7 (commencing with Section 25395.102) and Article 8 (commencing with Section 25395.109) to Chapter 6.82 of Division 20 of, and to repeal Article 7 (commencing with Section 25395.105) of Chapter 6.82 of Division 20 of, the Health and Safety Code, relating to hazardous materials.

LEGISLATIVE COUNSEL'S DIGEST

SB 989, as amended, Committee on Environmental Quality. Hazardous material: bona fide ground tenant: remedial actions.

Existing law, the California Land Reuse and Revitalization Act of 2004, provides that an innocent landowner, a bona fide purchaser, or a contiguous property owner, as defined, qualifies for immunity from liability from certain state laws for pollution conditions caused by a release or threatened release of a hazardous material, if the innocent purchaser, bona fide purchaser, or contiguous property owner meets specified conditions. The act also prohibits an agency from requiring an innocent landowner, bona fide purchaser, or contiguous property owner to take a response action under certain state laws. The act

defines the term “agency” as the Department of Toxic Substances Control, the State Water Resources Control Board, or a California regional water quality control board. Existing law repeals the act on January 1, 2010.

The act defines the term “applicable law” as meaning certain state statutory and common laws that impose liability on an owner or occupant of property for pollution conditions caused by a release or threatened release of hazardous material on, under, or adjacent to the property.

The bill would require a bona fide ground tenant, as defined, who seeks to qualify for immunity ~~from specified liability~~ to enter into an agreement with an agency along with one or more specified persons or entities that agrees to take responsibility for implementation of a site assessment and response plan.

The bill would provide that the immunity provided under these provisions would be from an applicable statute. The bill would authorize a bona fide ground tenant to request an agency to issue a certification of immunity and would require the agency to provide this certification within 60 days after the agency makes certain specified determinations. The bill would authorize an agency to withdraw the certification if the agency, after providing the bona fide ground tenant notice and an opportunity to cure, determines that the bona fide ground tenant materially deviated from the agreement or induced the agency to issue the certificate by fraud or intentional misrepresentation.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 25395.84 of the Health and Safety Code
- 2 is amended to read:
- 3 25395.84. (a) A court of competent jurisdiction may award
- 4 reasonable attorneys’ fees and experts’ fees to a person who
- 5 initiates a claim under an applicable law for contribution for, or
- 6 recovery of, response costs incurred for a response action, or for
- 7 any other response costs incurred at a site, if the person meets all
- 8 of the following criteria:
- 9 (1) The person is a bona fide purchaser, an innocent
- 10 landowner, a contiguous property owner, or a bona fide ground

1 tenant, as defined in subdivision (b) of Section 25395.102, and
2 qualifies for immunity pursuant to this chapter.

3 (2) The person is a prevailing party.

4 (3) On or before 20 calendar days prior to the date of the trial
5 on issues relating to the response costs at issue, the person serves
6 on the defendant both of the following:

7 (A) If a response plan has been approved for that site pursuant
8 to Article 6 (commencing with Section 25395.90) or a limited
9 response plan pursuant to Article 7 (commencing with Section
10 25395.102), as applicable, a copy of the approved response plan.

11 (B) A written demand for compensation setting forth the
12 specific sum demanded from the defendant, including a statement
13 of the reasoning supporting the demand. The amount of written
14 demand shall include all response costs sought from the
15 defendant at issue, including all interest, but shall not include
16 litigation expenses, attorneys' fees, and experts' fees. The
17 amount of the demand may include any alleged consequential
18 damages.

19 (b) In determining whether to award reasonable attorneys' fees
20 and experts' fees pursuant to this section, a court shall consider
21 the relationship of the amount of the written demand described in
22 subparagraph (B) of paragraph (3) of subdivision (a) to the total
23 sum of the response costs and, if appropriate and included in the
24 demand, the consequential damages in the written demand, to the
25 final determination of the costs and damages by the trier of fact.

26 (c) A court may award reasonable attorneys' fees and experts'
27 fees to an agency that is the prevailing party in an action arising
28 out of this chapter.

29 SEC. 2. Section 25395.85 of the Health and Safety Code is
30 amended to read:

31 25395.85. An innocent landowner, bona fide purchaser,
32 contiguous landowner, or bona fide ground tenant, as defined in
33 subdivision (b) of Section 25395.102, may seek contribution
34 from any person who is responsible for a discharge or release of
35 hazardous materials for which the innocent landowner, bona fide
36 purchaser, contiguous landowner, or bona fide ground tenant
37 incurs agency oversight costs for the review of a response plan or
38 a limited response plan or oversight of the implementation of a
39 response plan or a limited response plan subject to this chapter.

1 SEC. 3. Article 7 (commencing with Section 25395.105) of
2 Chapter 6.82 of Division 20 of the Health and Safety Code is
3 repealed.

4 SEC. 4. Article 7 (commencing with Section 25395.102) is
5 added to Chapter 6.82 of Division 20 of the Public Resources
6 Code, to read:

7
8 Article 7. Bona Fide Ground Tenant Immunity
9

10 25395.102. (a) Except as otherwise provided in this article,
11 the definitions in Article 2 (commencing with Section 25395.63)
12 and Article 6 (commencing with Section 25395.90) shall govern
13 the interpretation of this article.

14 (b) “Bona fide ground tenant” means a person who meets the
15 following conditions:

16 (1) The person is acceptable to the agency for entering into an
17 agreement pursuant to Article 6 (commencing with Section
18 25395.90) or this article, and the person requires a nonfee interest
19 in and control of the real property at a site on or after January 1,
20 2007, who acquires the interest and control pursuant to one of the
21 following:

22 (A) A ground lease with a term of 25 years or more.

23 (B) An easement with a term of 25 years or more.

24 (C) Any other legal means for site access and use that provides
25 for a term of 25 years or more.

26 (2) The person enters into an agreement with an agency
27 pursuant to this article along with any of the following:

28 (A) The person’s lessor or easement grantor.

29 (B) A redevelopment agency.

30 (C) A city or county.

31 (D) Any other person acceptable to the agency.

32 (3) All releases of hazardous materials at the site occurred
33 before the person obtained legal access to and control over the
34 site, except for a release that is of a type, nature or amount that
35 does not require reporting to a regulatory authority pursuant to
36 applicable law or other applicable statutory or regulatory
37 reporting requirements.

38 (4) The person did not cause or contribute to a release of
39 hazardous materials at the site, other than a release that is of a
40 type, nature or amount that does not require reporting to a

1 regulatory authority pursuant to applicable law or other
2 applicable statutory or regulatory reporting requirements.

3 (5) The person has contractually agreed with a person or entity
4 set forth in paragraph (2) that either of the following revenue
5 sources be dedicated to, or pledge to secure a loan the proceeds
6 of which are dedicated to, implementation of the response plan
7 approved pursuant to this article:

8 (A) All payments by that person to the site owner, at least until
9 such time as a response plan has been approved by the agency
10 and the agency has determined that something less than all of the
11 payments are sufficient to implement the response plan.

12 (B) An alternate asset or revenue stream that is acceptable to
13 the agency.

14 (C) To ensure that the revenue stream required by this
15 paragraph remains available to implement the response plan
16 approved pursuant to this article, an Internal Revenue Code
17 Section 468B settlement trust or other acceptable security
18 mechanism may be utilized. Agreements pursuant to this article
19 shall permit subordination of the security mechanism to permit
20 financing for site cleanup or development.

21 (6) The person is not potentially liable, or affiliated with a
22 person who is potentially liable, for the release at issue through
23 any of the following circumstances:

24 (A) A direct or indirect familial relationship.

25 (B) A contractual, corporate, or financial relationship, unless
26 the contractual, corporate, or financial relationship is created by
27 the instrument by which the person obtains control and
28 implements the development of the site, or is created by a
29 contract for the sale of goods or services.

30 (C) The result of a reorganization of a business entity that was
31 potentially liable for the hazardous substances at issue.

32 (c) For the purpose of this section, “release” does not include
33 passive migration.

34 (d) “Site” shall have the definition set forth in Section
35 25395.79.2, except that the exclusion for petroleum sites set forth
36 in paragraph (3) of subdivision (b) of that section shall not apply.

37 25395.103. (a) A bona fide ground tenant who seeks to
38 qualify for the immunity pursuant to Section 25395.104 shall
39 enter into an agreement pursuant to this article with an agency,
40 and an entity which agrees to take responsibility for

1 implementing a site assessment and response plan pursuant to
2 subdivision (b). The entity shall be one of the following:

3 (1) The person's lessor.

4 (2) A redevelopment agency.

5 (3) A city or county.

6 (4) Any other person acceptable to the agency.

7 (b) Except as otherwise provided in subdivision (c), an
8 agreement entered into pursuant to this article shall provide that
9 the entity that accepts responsibility for the site assessment and
10 response plan shall conduct a site assessment that substantially
11 complies with the requirements of Section 25395.94 and
12 implement a response plan that substantially complies with the
13 requirements of Section 25395.96. Both the site assessment and
14 the response plan shall be approved by the agency. Except as
15 necessary to comply with provisions of this article that differ
16 from Article 6 (commencing with Section 25395.90), agreements
17 pursuant to this article shall substantially conform to agreements
18 developed to implement Article 6 (commencing with Section
19 25395.90).

20 (c) An agreement entered into pursuant to this article shall
21 provide that the bona fide ground tenant is responsible to the
22 agency for only the portions of the site assessment and the
23 portions of the response plan that the agency determines to be
24 necessary to allow the site to be used for its intended purposes
25 without unreasonable risk to the human health and safety of the
26 intended site occupants. The bona fide ground tenant shall not be
27 responsible to the agency for any other assessment or
28 remediation of soil, soil gas, groundwater, or other media at the
29 site; nor for any assessment or remediation adjacent to, or in the
30 vicinity of, the site. The agreement shall also specify the portion
31 of the site assessment and the response plan to be implemented
32 by the party other than the bona fide ground tenant.

33 (d) Before finalizing the agreement, the agency shall notify
34 other appropriate agencies, including the host jurisdiction. The
35 agency shall keep, in a permanent archive, copies of all finalized
36 agreements entered into pursuant to this article.

37 (e) Agreements entered under this article shall not be subject
38 to Chapter 2 (commencing with Section 10290) of Part 2 of
39 Division 2 of the Public Contract Code.

1 (f) A person who enters into an agreement under this article
2 shall submit sufficient information to the agency for the agency
3 to determine whether the site is eligible, whether the person
4 meets the conditions to qualify as a bona fide ground tenant, and
5 to prepare an agreement pursuant to this section.

6 25395.104. (a) Except as otherwise provided in this section,
7 a bona fide ground tenant shall qualify for the following
8 immunities:

9 (1) The bona fide ground tenant shall not be liable under any
10 applicable ~~law~~ *statute* for a claim made by a person, other than an
11 agency, for response costs or other relief associated with a
12 release or threatened release of a hazardous material at the site
13 once the bona fide ground tenant obtains a certification pursuant
14 to subdivision (c) that the immunity provided by this section has
15 attached.

16 (2) (A) Except as provided in subparagraph (B), an agency
17 shall not, subsequent to the date of the agreement, take any action
18 under any applicable ~~law~~ *statute* to require a bona fide ground
19 tenant to take a response action on account of a release or
20 threatened release of a hazardous material at a site.

21 (B) The agency that entered into the agreement pursuant to
22 this article may take action under any applicable ~~law~~ *statute* to
23 enforce the conditions imposed on the bona fide ground tenant
24 pursuant to the agreement.

25 (b) Except as provided in subparagraph (B) of paragraph (2) of
26 subdivision (a), the immunity provided in this section shall attach
27 to a bona fide ground tenant once the agency certifies in writing,
28 pursuant to subdivision (c), that all of the following have
29 occurred:

30 (1) A site assessment has been completed sufficient for the
31 agency to determine the remedial measures necessary to allow
32 the site to be used for its intended purposes without unreasonable
33 risk to the human health and safety of the intended site
34 occupants.

35 (2) Except for site monitoring, reporting, institutional controls,
36 operation and maintenance activities, and other ongoing
37 obligations of the bona fide ground tenant, if any, the portion of
38 the site investigation and the response plan necessary to allow the
39 site to be used for its intended purposes without unreasonable
40 risk to the human health and safety of the intended site

1 occupants, including any confirmation sampling required by the
2 agency to confirm that this standard has been met, has been
3 implemented to the agency's satisfaction.

4 (3) To the extent required in the agreement entered into
5 pursuant to this article, all wells, piping, extraction systems, or
6 similar materials or equipment required for the conduct of
7 remediation efforts to be performed by a person other than the
8 bona fide ground tenant have either been installed to the agency's
9 satisfaction or have been accounted for to the agency's
10 satisfaction in site development plans and specifications.

11 (4) If applicable, a memorandum of the agreement entered into
12 pursuant to this article and satisfactory to the agency has been
13 recorded with the recorder's office of the county where the site is
14 located. The memorandum shall indicate the human use
15 addressed in the agreement, any institutional or engineering
16 controls provided for in the response plan, and contact
17 information for the parties to the agreement.

18 (c) A party to an agreement pursuant to this article may
19 request the agency to issue a written certification confirming that
20 the conditions stated in subdivision (b) have been met and that
21 the immunity provided for in this section is in effect. The agency
22 shall provide this certification within 60 days of the date it finds
23 that the conditions stated in subdivision (b) have been met.

24 (d) The agency that issued a certification pursuant to
25 subdivision (c) may withdraw that certification if it first provides
26 reasonable notice and opportunity for the bona fide ground tenant
27 to take action to prevent the withdrawal, and subsequent to the
28 notice and cure opportunity makes any of the following findings:

29 (1) A material deviation from those requirements applicable to
30 the bona fide ground tenant under the agreement entered into
31 pursuant to this article that has not been approved by the agency
32 exists and continues to exist subsequent to the notice and cure
33 period.

34 (2) The bona fide ground tenant induced the agency to issue
35 the certification by fraud, or intentional nondisclosure or
36 misrepresentation.

37 (e) Upon the agency's certification pursuant to subdivision (c),
38 the immunity provided in this section extends to all of the
39 following:

40 (1) The bona fide ground tenant.

1 (2) A person who acquires an interest in or a dwelling unit at
2 the site from the bona fide ground tenant.

3 (3) A person who provides financing to the bona fide ground
4 tenant or a person specified in paragraph (2).

5 (f) The immunity provided in this section does not extend to a
6 person who was a responsible party, as that term is defined in
7 Section 25323.5 for the release at the site prior to acquiring an
8 interest in the site from the bona fide ground tenant or providing
9 financing as specified in paragraph (3) of subdivision (e).

10 (g) The immunity provided in this section shall be in addition
11 to any other immunity provided by law.

12 (h) This section shall not modify or limit the existing authority
13 of a state or local agency to impose a condition on the issuance of
14 a discretionary permit relating to the development, use, or
15 occupancy of a site.

16 (i) This section shall not relieve a bona fide ground tenant
17 from reporting, disclosure, and notification requirements under
18 any applicable statute.

19 (j) The entry into an agreement pursuant to this article shall
20 not constitute an admission of any fact or liability or conclusion
21 of law for any purpose or proceeding and a person who enters
22 into an agreement under this article shall not be deemed liable
23 under any other provision of law solely by reason of entering into
24 the agreement.

25 (k) If the use of the property changes, after a response plan is
26 approved, to a use that requires a higher level of protection, the
27 agency may require the preparation and implementation of a new
28 response plan pursuant to this article.

29 (l) A bona fide ground tenant that purchases a site subsequent
30 to leasing, or taking an easement in the site, may convert its
31 status to that of a bona fide purchaser pursuant to Article 6
32 (commencing with Section 25395.90) if the bona fide ground
33 tenant meets the requirements of Section 25395.69 and Article 6
34 (commencing with Section 25395.90). Upon the conversion, the
35 bona fide ground tenant shall qualify for any and all immunities
36 available to a bona fide purchaser under this chapter.

37 (m) If the response plan proposed allows the site to be used for
38 its intended purposes without unreasonable risk to the human
39 health and safety of the intended site occupants through the use
40 of institutional or engineering controls or monitoring, the bona

1 bona fide ground tenant seeking immunity shall provide periodic
2 reports as required by the agency to demonstrate that there
3 remains no unreasonable risk to the human health and safety of
4 the intended occupant. The bona fide ground tenant shall not
5 make any change in use of the site that is inconsistent with any
6 land use control recorded for the site unless the change is
7 approved by the agency pursuant to Sections 25233 and 25234
8 or, in the case of the board or a regional board, substantially
9 similar procedures.

10 25395.105. (a) Notwithstanding subdivision (b) of Section
11 25395.102, on and after the date when the immunity specified in
12 Section 25395.104 attaches, a person shall remain eligible for
13 immunity if a release of hazardous materials at the site during a
14 response action is de minimis and the agency determines that all
15 necessary response actions to address the release have been
16 taken.

17 (b) Notwithstanding subdivision (b) of Section 25395.102 with
18 respect to a release of hazardous materials at the site that is not
19 characterized in or through the site investigation or the response
20 plan, a person shall remain eligible for the immunity provided in
21 Section 25395.104, if the person takes response actions with
22 respect to the release of hazardous materials that the agency
23 determines to be necessary to prevent unreasonable risk to the
24 human health and safety of the intended site occupants specified
25 in the agreement entered into pursuant to this article.

26 (c) Notwithstanding subdivision (b) of Section 25395.102, on
27 and after the date when the immunity specified in Section
28 25395.104 attaches, a person shall remain eligible for immunity
29 obtained pursuant to this article with regard to a release that is
30 the subject of a certificate of completion and immunities issued
31 pursuant to Section 25395.104. If the person causes or
32 contributes to a release of a hazardous material, other than a de
33 minimis release, the person shall be responsible for responding to
34 that release in accordance with all applicable law.

35 25395.106. (a) This article does not provide immunity from
36 any of the following:

37 (1) Liability for bodily injury or wrongful death.

38 (2) A requirement imposed under Chapter 6.5 (commencing
39 with Section 25100), including, but not limited to, corrective
40 action and closure and postclosure requirements.

1 (3) A ~~Criminal~~ *criminal* act.

2 (4) A permit violation.

3 (5) A contractual indemnity agreement between a purchaser
4 and seller of real property.

5 (6) New releases, other than de minimis releases, of hazardous
6 materials that are caused or contributed to by a bona fide ground
7 tenant.

8 (b) This article does not limit the authority of an agency to
9 conduct a response action that is necessary to protect public
10 health and safety or the environment pursuant to an applicable
11 statute.

12 (c) This article does not do either of the following:

13 (1) Limit a defense to liability that may be available to a
14 person under any other provision of law.

15 (2) Impose a new obligation on a bona fide ground tenant
16 other than those specifically assumed by the bona fide ground
17 tenant under an agreement entered into pursuant to this article.

18 25395.107. A bona fide ground tenant shall be entitled to
19 seek contribution, and to recover attorney's fees and costs
20 pursuant to Sections 25395.84 and 25395.85 in the same manner
21 and to the same extent as if that person had been deemed a bona
22 fide prospective purchaser, innocent landowner or contiguous
23 land owner.

24 SEC. 5. Article 8 (commencing with Section 25395.109) is
25 added to Chapter 6.82 of Division 20 of the Health and Safety
26 Code, to read:

27
28 Article 8. Repeal
29

30 25395.109. This chapter shall remain in effect only until
31 January 1, 2010, and as of that date is repealed, unless a later
32 enacted statute, that is enacted before January 1, 2010, deletes or
33 extends that date.